No. 1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *et al., Petitioners,*

v.

DONNELLY GARMENT COMPANY, a Corporation; DONNELLY GARMENT SALES COMPANY, a Corporation; DONNELLY GARMENT WORKERS' UNION, *et al.*, and CENTRAL SURETY AND INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on January 19, 1945 (R. 593) affirming the judgment of the District Court of the United States for the Western District of Missouri.

OPINIONS BELOW

The opinion of Judge Nordbye in the District Court for the Western District of Missouri (R. 542-567) is reported at 55 F. Supp. 572. Another opinion by Judge Nordbye in this proceeding (R. 33-36) is reported at 47 F. Supp. 67. The opinion in the Circuit Court of Appeals (R. 575-593) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 19, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Plaintiffs and interveners obtained an injunction against a labor union and others, and posted, at various times, three bonds. They claimed, originally, that no "labor dispute" was involved, the District Court agreed, and the first two bonds were framed under the Clayton Act. The Norris-LaGuardia Act subsequently was held to apply, and a third bond was filed, although not in the terms required by that Act. The injunctive orders were all finally held to be erroneous. In this proceeding by the defendants in the suit for injunction to recover "loss, expense or damage" under Section 7 of the Norris-LaGuardia Act, the questions presented are:

1. Whether the first two bonds given by the plaintiffs and interveners in a suit in which the Norris-LaGuardia Act has finally been held applicable are to be read as incorporating the provisions of Section 7 of that Act prescribing the scope of the required undertaking.

2. Whether the final bond, given by plaintiffs and interveners after the Norris-LaGuardia Act was finally held applicable, is not in any event to be read as incorporating those provisions of Section 7.

3. Whether defendants are not entitled to recover by reason of Section 7, irrespective of the bonds, all reasonable attorneys' fees and expenses incurred in connection with the defense against the suit for injunction.

STATUTE INVOLVED

Section 7 of the Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. Sec. 101, *et seq.*) provides, in part, as follows:

> "* * * No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> "The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action

under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

STATEMENT

Petitioners, defendants in a suit for injunction, instituted this proceeding under Section 7 of the Norris-LaGuardia Act following a decision by the Circuit Court of Appeals for the Eighth Circuit that all of the injunctive orders had been erroneously granted by the District Court (119 F. (2d) 892). As authorized by Section 7, the proceeding was begun by motion in the suit for injunction for a hearing to assess against respondents (plaintiffs and interveners below and their surety) the losses, expenses and damages caused petitioners by the erroneous issuance and continuance of a temporary restraining order, temporary injunction, and permanent injunction. The course of proceedings which finally resulted in this hearing extended over a period of more than four years. In brief summary, it is as follows (for the sake of clarity, and in order to distinguish between the various respondents, we shall refer to the parties as they were designated in the injunction suit):

The Parties.—The defendants in the injunction suit are the International Ladies' Garment Workers' Union (hereinafter called "the International"), an international union of workers employed in the women's garment manufacturing industry, and certain of its officers; certain of the locals of the International and certain of their officers; and a large number of the members of the International and locals (R. 37-38; Def. Exh. 152, p. 1, R. 78).

The plaintiffs are two corporations organized under the laws of Missouri: the Donnelly Garment Company, a manufacturer of women's dresses, and the Donnelly

Garments Sales Company, its selling subsidiary (R. 38; Def. Exh. 152, p. 13, R. 78). The interveners are members of the Executive Committee of an unincorporated association of employees of these two corporations, and the association itself—a so-called "plant union"—known as the Donnelly Garment Workers' Union (R. 38; Def. Exh. 152, p. 44, R. 78). Central Surety and Insurance Company is surety on all bonds filed by plaintiffs and interveners. (R. 11, 16-20, 26, 38, 186, 203, 217.)

The First Phase of the Litigation: The Temporary Restraining Order of July 5, 1937.—Plaintiffs instituted this suit on July 5, 1937, to enjoin the defendants from certain acts allegedly done or threatened in furtherance of a conspiracy to destroy the plaintiffs' interstate trade and commerce in violation of the anti-trust laws. Jurisdiction was expressly and solely predicated upon the Sherman and Clayton Acts. (R. 11, 13, 21, 26, 29, 38, 42; Original Bill, R. 181.) Upon presentation of the bill of complaint by the plaintiffs at an *ex parte* hearing, Judge Otis granted a temporary restraining order and fixed the amount of the bond at $2,000 (R. 181). On the same day the plaintiffs filed a bond for $2,000 (R. 16, 186), which provides that if the plaintiffs shall pay

> "all such costs and damages as may be incurred or suffered by reason of the wrongful issuance of said restraining order or injunction should it be thereafter dissolved or it be decided that said temporary restraining order was wrongfully obtained, then this obligation to be void, otherwise to remain in full force and virtue." (R. 187.)

Shortly after issuance of the order, defendants launched the first of several attacks upon it. Various

motions contesting jurisdiction and seeking vacation of the order and dismissal of the bill were prepared and filed (R. 59-61, 265-66; Def. Exh. 133, p. 1, R. 58). From the outset it was urged that a labor dispute was involved, that the plaintiffs had failed to comply with the Norris-LaGuardia Act, and that the court was without jurisdiction to issue any restraining order or temporary or permanent injunction (R. 59, 188, 191, 265-66). The plaintiffs argued strenuously that the Norris-LaGuardia Act was inapplicable (R. 191).

On July 10, 1937, Judge Otis heard argument upon the motions (R. 59, 265). Pending the preparation and filing of briefs by the defendants, the plaintiffs amended their bill of complaint to add a prayer for damages. Amended motions were thereupon filed on behalf of the defendants (R. 266-67). Briefs and reply briefs were filed (R. 59-61, 265-66; Def. Exhs. 134-137, R. 61). On August 13, 1937, Judge Otis overruled the motion to vacate the temporary restraining order and dismiss the bill but sustained a motion to strike the amendments adding the claim for damages and a motion to quash service on defendant Perlstein as an individual and as agent of the International, its officers and its General Executive Board (R. 191; 20 F. Supp. 767).

Since service had also been made upon the International through defendant Wave Tobin as agent, a motion was made on July 31, 1937, to quash such service (R. 267). After a hearing on September 4, 1937, and after a brief had been filed (Def. Exh. 138, R. 62), the motion was overruled by Judge Otis on September 27, 1937 (R. 63).

The final step in this first stage of the litigation to set aside the temporary restraining order was taken on September 18, 1937. The plaintiffs had in the meantime

further amended their petition because of certain developments before Judge Otis during the hearing held on September 4, and the defendants filed a motion to dismiss, notwithstanding the amendment (R. 63; Def. Exh. 133, p. 2, R. 58).

The Second Phase of the Litigation: The Temporary Injunction of January 7, 1938.—The Donnelly Garment Workers' Union intervened on September 23, 1937 (R. 63, 192). The petition of intervention contained many allegations similar in nature to those contained in the bill and adopted the same prayers for relief against defendants (Def. Exh. 141, p. 43, R. 68). However, it also alleged that if the course of conduct described constituted a labor dispute within the meaning of the Norris-LaGuardia Act and the National Labor Relations Act, those Acts were unconstitutional (R. 192). Concluding that the petition had injected constitutional issues into the case and that the District Court should, under the then very recent Act of August 24, 1937, be apprised of that fact (R. 63-64), the defendants called the matter to the attention of the District Court in a motion filed on October 5, 1937. Plaintiffs not only agreed that the constitutional questions were in the case but cited cases to the court showing that constitutional issues had been raised (R. 64-65, 194-96). On the same day, Judge Otis certified the fact that the constitutionality of acts of Congress affecting the public interest had been drawn in question and requested the senior Circuit Judge to designate two other judges to participate in hearing and determining the applications for interlocutory and permanent injunctios (R. 65, 194). Judge Kimbrough Stone designated Judge Van Valkenburgh, Judge Reeves and Judge Otis (*cf.* R. 486).

The trial of the cause before the three-judge court—with both affidavits and oral testimony—took place early in November, 1937 (Def. Exhs. 141, 142, R. 68). Briefs and reply briefs were filed (R. 66-67, Def. Exhs. 140, 154, R. 67, 270). On December 31, 1937, the three-judge court announced its decision (27 F. Supp. 807) holding that no labor dispute existed within the meaning of the Norris-LaGuardia Act, granting a temporary injunction and denying defendants' motion to dismiss. Judge Otis dissented. The decree was filed January 7, 1938 (R. 197). On the same day, the plaintiffs and interveners filed a bond for $10,000—the amount required by the court—providing that if the principals shall pay

> "all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary injunction, if it be finally held that said temporary injunction was improvidently granted, then this obligation to be void; otherwise to be and remain in full force and effect." (R. 204.)

The defendants appealed to this Court (R. 67-70; Def. Exhs. 144, 145, R. 70). On May 16, 1938, the Court, after having noted probable jurisdiction (R. 69), dismissed the appeal for want of jurisdiction, but vacated the temporary injunction and remanded the cause to the District Court (304 U. S. 243).

The Third Phase of the Litigation: The Temporary Restraining Order as Modified and Continued July 18, 1938.—After the Supreme Court decision, plaintiffs and interveners both moved for and received leave to amend. On May 23, 1938, defendants filed a motion to vacate the temporary restraining order and to dismiss the bill and petition of intervention on the grounds

that the court was without jurisdiction over the subject matter of the suit and that plaintiffs and interveners had failed to comply with the Norris-LaGuardia Act (R. 71, 210, 273; Def. Exh. 152, p. 5, R. 78). Briefs were filed and the motion was argued on June 13, 1937 (R. 71-72, Def. Exhs. 146-147, R. 72-73). On July 8, 1938, Judge Collet, who had taken the case after counsel for plaintiffs had objected to further participation by Judge Otis (R. 71, 273), held that the bill and petition did not contain the requisite allegations under the Norris-LaGuardia Act and for that reason should be dismissed (R. 73, 211, 273; Def. Exh. 152, p. 61, R. 78). On July 18, 1938, Judge Collet entered a decree, in which he dismissed the bill and petition, and, over defendants' protest (R. 212-213), modified the temporary restraining order of July 5, 1937, and continued it as modified pending appeal (R. 73, 213; Def. Exh. 152, p. 67, R. 78). On the same day, the plaintiffs and interveners filed a bond for $25,000—the amount required by the court—providing as follows:

> "The condition of the above obligation is such that, whereas, the temporary restraining order heretofore issued in this cause is continued as modified on this 18th day of July, 1938, pending appeal of this cause, now, therefore, if the obligors and each of them shall well and truly pay all costs, damages and expenses, including attorneys' fees, suffered by defendants or any of them, by reason of the improvident or erroneous issuance or continuance of said restraining order, then this bond shall be void, otherwise to remain in full force and effect." (R. 218.)

Plaintiffs and interveners were allowed an appeal to the Circuit Court of Appeals on August 4, 1938 (R. 274; Def. Exh. 152, p. 6, R. 78), and that court, on October

28, 1938, reversed Judge Collet's decision dismissing the bill and petition on the ground that, although the Norris-LaGuardia Act applied, the bill sufficiently alleged compliance therewith (99 F. (2d) 309; Def. Exh. 152, p. 68-13, R. 78). The decision continuing the temporary order, modified to meet the requirements of the Norris-LaGuardia Act, was affirmed (99 F. (2d) at 317). The defendants filed a petition for rehearing which was denied (R. 76). The defendants then filed a petition for certiorari (R. 76; Def. Exh. 148A, R. 99-100). That petition was denied on January 16, 1939 (308 U. S. 662), and on January 28, 1939, the mandate of the Circuit Court of Appeals remanding the cause for further proceedings, was filed in the District Court (R. 220).

On February 7, 1939, the defendants filed a motion to vacate the temporary restraining order (R. 76, 229, 275). Judge Collet took it under advisement, and on March 3, 1939, he issued an order, in which he made no ruling but stated his belief that the restraining order had theretofore ceased to exist (R. 230; Def. Exh. 152, p. 82, R. 78).

The Fourth Phase of the Litigation: The Permanent Injunction of April 27, 1939.—On March 4, 1939, defendants' counsel began preparing for the trial of the cause on the merits. Answers were filed to the plaintiffs' amended complaint and the interveners' amended petition; depositions taken, and a trial brief drafted (R. 76-77, 92-93; Def. Exh. 149, R. 77). The trial opened on March 21, 1939, and lasted until April 26, 1939. On April 27, 1939, the District Court granted a permanent injunction against the defendants (R. 78; Def. Exh. 152, p. 129, R. 78).

The defendants appealed. Briefs were filed (Def. Exhs. 150-151, R. 79-80), and the case was argued in March, 1940 (R. 342). On January 27, 1941, the Circuit Court of Appeals on its own motion vacated the prior submission and ordered a reargument limited to the "effect or bearing of the pertinent opinions of the Supreme Court handed down since the submission of this case" (R. 306). Further briefs were filed and the case was reargued (Def. Exhs. 161, 162, R. 363-64; 303).

On June 5, 1941, the Circuit Court of Appeals reversed the decree of the District Court granting the permanent injunction (R. 41, 246, 303), stating (119 F. (2) at 893):

> "Jurisdiction is predicated solely upon the Sherman Act, and if that Act is inapplicable, as the defendants assert, the court below was without jurisdiction."

It then held that the Sherman Act did not apply, and remanded the cause with directions to dismiss the complaint for want of jurisdiction (119 F. (2d) 892). The plaintiffs and interveners filed a petition for rehearing, and a motion to amend the mandate, and the defendants filed a memorandum in opposition (R. 304, 364-65; Def. Exh. 163, R. 365). On July 11, 1941, the court denied the petition for rehearing and the motion to amend the mandate as requested by plaintiffs and interveners, but it did modify its prior mandate to the extent of eliminating the direction to dismiss for lack of jurisdiction, and substituted therefor a remand "for further proceedings not inconsistent with the opinion of this Court" (121 F. (2d) 561, R. 246). The mandate, recorded in the District Court on August 29, 1941, ordered "the Decree of the District Court of the United

States for the Western District of Missouri * * * reversed for want of jurisdiction * * *" (R. 248).[1]

The Expenses of the Litigation.—The International, to which successful defense against the injunctions was vital, took over the entire defense of the suit, and its entire expense. The ultimately successful opposition to the various injunctive orders sought by plaintiffs and interveners cost the International $102,913.57, made up as follows:

1. Legal Fees	$74,925.00
2. Attorneys' Disbursements	8,918.32
3. Reporting and Stenographic Services	8,674.83
4. Photographs and Photostats	946.98
5. Printing	4,663.90
6. Temporary Office	359.49

Evidence as to the reasonableness and necessity of these amounts was adduced in the District Court, and, in addition, following a suggestion of the trial judge (R. 56) evidence was adduced allocating the total among the four phases of the litigation, and in some cases among well-defined portions of the phases themselves (R. 86-93, 256-258, 278, 283-284). In view of the nature of the decisions below, however, it is unnecessary to set forth this evidence.

The court below, and the District Court, held that since the $2000 and $10,000 bonds were given in conformity with the Clayton Act, which did not contemplate attorneys' fees or expenses as "damages", no re-

[1] Upon remand the plaintiffs and interveners dismissed all resident defendants and amended the bill of complaint and petition of intervention to state a cause of action based upon the same allegations of fact but upon a different theory of jurisdiction. After a full trial the bill and petition were dismissed upon the merits. 55 F. Supp. 572.

covery could be had upon them; that the $25,000 bond was given under Equity Rule 74, rather than under Section 7, as contended by defendants, and that it, too, therefore, must be limited to its precise terms: litigation expense and attorneys' fees incurred by reason of the temporary restraining order of July 5, 1937, which were found to be $2000; that the terms of Section 7 of the Norris-LaGuardia Act would not be read into any of the bonds; and that no recovery could be had upon the authority of Section 7, itself. As to the $10,000 bond, the District Court also denied recovery on the ground that the expenses and attorneys' fees resulting from the issuance of the temporary injunction were incurred in an "unnecessary and ill-advised" appeal to the Supreme Court. This was not passed upon by the court below. The District Court gave judgment for the defendants for $2000 on the $25,000 bond, and this judgment was affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing and refusing to hold that the defendants were entitled, under the provisions of the three bonds, construed as incorporating Section 7 of the Norris-LaGuardia Act, to recover the sum of $102,913.57.

2. In failing and refusing to hold that the defendants were entitled, under the provisions of the three bonds, construed as incorporating Section 7, to recover at least the sum of $37,000, the total amount of the bonds.

3. In failing and refusing to hold that the bond for $25,000 was exacted under Section 7 of the Norris-LaGuardia Act, rather than Equity Rule 74, and that defendants were, therefore, entitled to full recovery on this bond.

4. In failing and refusing to hold that Section 7 of the Norris-LaGuardia Act, irrespective of the bonds, authorized the recovery by defendants of the sum of $102,913.57, or, in the alternative, the sum of $37,000.

5. In failing and refusing to hold that recovery upon the bond for $10,000 was not barred because the expenses and attorneys' fees resulting from the issuance of the temporary injunction were incurred in connection with an unnecessary and ill-advised appeal to the Supreme Court.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

Neither the court below nor the District Court denied, of course, that the various injunctive orders were erroneously issued, since the court which issued them was without jurisdiction. Nor did either court deny that the bill and the petition of intervention involved a "labor dispute", and hence that the controversy is within the Norris-LaGuardia Act. Yet, despite those facts, the court below has reached the anomalous conclusion that notwithstanding the issuance of erroneous injunctive orders in a case falling within the scope of the Norris-LaGuardia Act, Section 7 of that Act is ineffective and irrelevant.

The issues, here, are legal, not factual. Recovery was denied, except for the $2000, on legal grounds. Those grounds, however, we believe to be in conflict with decisions both of this court and of other circuit courts of appeal. We also believe that the decision below presents an important question as to the proper interpretation and application of a vital part of the Norris-LaGuardia Act. On both grounds, we believe that review by this

Court is fully warranted, particularly since in both aspects of the case the decision below reverses a uniform trend of decision in the District Courts.

I

THE DECISION OF THE COURT BELOW REFUSING TO CONSTRUE THE BONDS IN THE LIGHT OF THE APPLICABLE STATUTE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL

The court below concedes (R. 587) that there is a well-settled rule requiring statutory bonds and the mandatory statute requiring them to be read *in pari materia*. When the principal on a statutory bond "applies for and receives the contract, privilege or benefit authorized by the statute on the condition expressed in the statute that the principal execute a bond in the terms provided by the statute" then, the court agrees, the principal "is conclusively presumed to have intended to execute the bond in the amount and upon the condition demanded by the statute, the benefit of which he accepts; the language of the statute is written into the bond, though omitted by inadvertence or intention" (R. 587, 588). Many decisions agree. *E.g., Hill* v. *American Surety Co.*, 200 U. S. 197; *Heiser* v. *Woodruff*, 128 F. (2d) 178 (C. C. A. 10th); *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. (2d) 503 (C. C. A. 2d); *Hays* v. *Fidelity & Deposit Co.*, 112 Fed. 872 (C. C. A. 5th).

Here, however, the court below has held (R. 588) that "the rule cannot be applied in the present case" because at the time that the bonds were exacted the District Court had ruled, albeit in error, that the Norris-LaGuardia Act did not apply. The court below cited no cases which

articulate or support any such distinction,[2] nor are we aware of any. On the contrary, the decisions which enunciate the *in pari materia* rule uniformly apply the rule despite any such contention by the principal or the surety. One decision, *McNamara* v. *Calvin*, unreported (N. D. Ill.), which also involved Section 7 of the Norris-LaGuardia Act, is squarely *contra* to the decision below; there the section was read into the bond notwithstanding the fact that the Act had not been passed at the time that the bond was filed.[3] In addition, there are many cases involving actions on bonds required by mandatory statutes in which the argument of the defendant that the bond in suit was not executed or intended as a statutory bond has been summarily rejected. See, *e.g.*, *United States* v. *Hamilton*, 96 F. (2d) 878, 880 (C. C. A. 7th). *Cf. Universal Electric Construction Co.* v. *Robbins*, 194 La. 194 (Ala.); *Camdenton School District* v. *New York Gas Co.*, 340 Mo. 1070, 104 S. W. (2d) 319; *Baumann* v. *City of West Allis*, 187 Wis. 506, 204 N. W. 907. Whether or not the principal on the bond purports to accept the terms of the mandatory statute, the decisions uniformly hold that he is chargeable with notice of all provisions of the applicable statute, and must be conclusively deemed to have acted under it.[4] Indeed, these

[2] The cases cited at R. 589, beginning with *Tenth Ward Road District* v. *Texas & Pacific R. Co.*, 12 F. (2d) 245 (C. C. A. 5th), do not bear even remotely on the issue. They hold merely that in the absence of a mandatory statute, the language of the bond controls, and in the absence of a bond, damages are *damnum absque injuria*.

[3] We have reproduced a statement of the facts and the opinion of Judge Johnson as an Appendix to this petition.

[4] In the *Baumann* case, *supra*, the court stated (204 N. W. at pp. 914-915):

> "Such a statute will be construed in the light of the conditions and circumstances which gave rise to the law, and to

cases are no more than a specific application of the principle that applicable statutes in force when a contract is made, and which affect its validity, performance or enforcement, enter into and form a part of it as if they were expressly referred to and incorporated in its terms. *McCracken* v. *Hayward*, 2 How. 608, 613; *Northern P. R. Co.* v. *Wall*, 241 U. S. 87, 91; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 19 (C. C. A. 8th), aff'd 209 U. S. 56; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663, 666 (C. C. A. 2d), cert. denied 280 U. S. 555; *Cunningham* v. *Weyerhaeuser Timber Co.*, 52 F. Supp. 654, 656 (W. D. Wash.).

Nor is the refusal of the court below to follow the applicable rule supported by reason or logic. Statutes do not, ordinarily at least, apply only if someone purports to obey them. We can perceive no essential difference between a faulty bond given because of a faulty interpretation of a statute, for example, and a faulty bond given because of a faulty decision as to which of two statutes is applicable. Under the decision below, if plaintiffs in a labor dispute can induce two errors instead of one—not only error in the granting of the injunctive order, but also error in the applicability of the Norris-LaGuardia Act—they can successfully escape the liability Congress intended to impose upon them by Section 7.

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effectuate the purpose which the Legislature sought to accomplish. * * * This purpose may not be defeated by the voluntary act or by the oversight of the parties in failing to insert such a provision in the contract. The law imputes such provision to the contract whether written therein or not. The liability is one arising by virtue of the law, independent of the contract. Like the law providing for a standard fire insurance policy, it is both a law and a contract."

We respectfully submit, therefore, that the decision below is not only squarely contrary to the only other decision on this point decided under Section 7, but it is also in direct conflict with the various decisions of this Court and of other Circuit Courts of Appeal which apply the *in pari materia* rule. We also believe it obvious that the intention of Congress to afford full protection to defendants in labor disputes is plainly thwarted.

II

THE DECISION OF THE COURT BELOW REFUSING TO ALLOW DEFENDANTS TO RECOVER UNDER SECTION 7 ITSELF, APART FROM THE BONDS, IS AN ERRONEOUS CONSTRUCTION OF AN IMPORTANT FEDERAL STATUTE

Defendants also urged, both in the District Court and the court below, that they were entitled under Section 7 to recover, apart from the bonds, all reasonable attorneys' fees and expenses incurred in connection with the suit for injunction. This argument, of course, is complementary to that stated in Point I, *supra*. It, too, was rejected by the court below (R. 586-587). We believe that the decision in this respect also warrants review, since it is a construction of doubtful validity on an important aspect of an important federal statute.

Section 7, *supra*, p. 3, provides that in cases under the Act no temporary injunctive orders shall issue—

> "except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined"—

against the specified losses, expenses and damages. This is comprehensive, clear, language: a complainant, as a

condition of securing any temporary relief, must *undertake* to make defendants whole if they are wrongfully enjoined. We submit that defendants are entitled to recover on that undertaking—that promise.

The court below denied recovery on this basis by refusing to read the statute literally. It said that "an undertaking *with* adequate security" is simply a bond (R. 586-587). The clear distinction in the statute between the "undertaking" on the one hand, and the "adequate security" on the other is ignored. Under Section 7, the "undertaking" is the promise required of the complainant to pay all of the specified expenses and damages; the "adequate security" is simply the assurance to the defendant that the "undertaking" will be performed at the conclusion of the litigation. The "undertaking" requires no action by the court; the "adequate security", since it must necessarily be in a fixed dollar amount, must be determined in advance, and hence Section 7 provides that it is to be "in an amount to be fixed by the court".

The court below, in seeking to justify its refusal to permit recovery on the "undertaking", stated that "the bond should be the evidence and the measure of the plaintiff's liability and the defendant's protection" (R. 586). There is no suggestion in the statute, however, that Congress was concerned with according to *plaintiffs* a price ceiling, a limited liability, on erroneous injunctions; rather, the whole background and tenor of the Act make it apparent that Congress was concerned with affording *defendants* full protection against abuses of the federal injunctive process. That is the fundamental premise upon which the whole Norris-LaGuardia Act is based. That is the conclusion which is indicated

by the legislative history of Section 7.[5] That is the result indicated by state statutes contemporaneous with the Norris-LaGuardia Act. At the time the Act was passed, several states accorded defendants wrongfully enjoined full recovery of all losses or damages which they had sustained.[6] It can scarcely be doubted that Congress, in the Norris-LaGuardia Act, intended to give to defendants wrongfully enjoined in labor disputes the most complete protection known to American equity practice. The restrictive view adopted by the court below literally emasculates Section 7 of the statute.[7] As this Court stated in *Bird* v. *United States*, 187

[5] The House Bill, H. R. 5315, originally omitted the words "in an amount to be fixed by the court". They were added by the House Committee, and adopted in the conference report with the following statement (H. Rep. No. 821, 82d Cong., 1st Sess., p. 7):

> "The second subdivision of Section 7 of the House bill expressly gives the court the power to fix the *amount of the security* in the undertaking filed by the complainant".

Thus the clear distinction between the "undertaking" and the "adequate security" was recognized; the security is subject to the court's control, while the undertaking is simply the statutory promise that the defendant will be made whole if the injunctive order turns out to have been erroneously issued.

[6] *Kohlsaat* v. *Crate*, 144 Ill. 14, 32 N. E. 481; *Officer* v. *Morrison*, 54 Ore. 459, 102 Pac. 792; *Johnson* v. *McMahan*, 40 S. W. (2d) 920 (Tex. Civ. App.); *Corpus Christi Gas Co.* v. *City of Corpus Christi*, 46 F. (2d) 962 (C. C. A. 5th), construing Texas law; *Houghton* v. *Grimes*, 103 Vt. 54, 151 Atl. 642.

[7] The protection of Section 7 is, in fact, most necessary in just those cases in which the court below rules it wholly ineffective. When a plaintiff in a labor dispute manages to convince a lower court, erroneously, that the Norris-LaGuardia Act does not apply at all, none of the substantive and procedural protection afforded to defendants by that Act are available. It is in just such a case that the defendants should be accorded at least the full protection against losses and damages resulting from the erroneous injunction. Yet as construed by the court below, it is in just this situation that the Act becomes ineffective to protect the defendants.

U. S. 118, 124, there is a "presumption against a construction which would render the statute ineffective or inefficient".

Finally, that is the conclusion indicated by the only judicial opinions on the issue. In *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830 (E. D. Mich.), the court, after reviewing Section 7, stated: "I take this to mean that defendants are entitled to recover all damages and all reasonable expenses caused them by this suit." And in *Houston & N. T. M. F. Lines* v. *Local No. 745*, 27 F. Supp. 262, 264 (N. D. Texas), the court stated of Section 7 (in a dictum, because recovery was denied due to failure of proof): "It could hardly mean that expenses were to be allowed, only, if the bond were given."

III

The questions involved are important

It is unnecessary to elaborate on the importance of the Norris-LaGuardia Act in the structure of labor's bill of rights. Nor is it necessary to dwell on the importance of Section 7 as an integral part of that Act. Congress recognized that despite all safeguards, erroneous injunctions would still be issued, and Congress included Section 7 as a means for according adequate reparations to those who might still be subjected to erroneous restraints. To give to Section 7 a construction which would result in less than full indemnity would make it ineffective, and would distort the clear purpose of Congress in enacting it. As the court stated of Section 7 in the *Houston* case, *supra*, "A liberal construction, though, should be allowed, to accomplish its purpose". Yet if the lower court is correct in the instant case, Section 7 added very little to the protection of defendants which was not available before its enactment.

Moreover, it nullifies the liberal construction which has been given to Section 7 by the District Courts to which the litigation on Section 7 has heretofore been confined.

Indeed, the fact that this is the first case involving Section 7 which has reached an appellate court in the course of more than 12 years indicates a characteristic of litigation under Section 7 which cannot be ignored. Few cases warrant an appeal; the District Court decisions are perforce accepted as final. Here, the protracted nature of the litigation, and the enormous expense to which the defendants were put in finally ridding themselves of erroneous restraining orders warranted review by appellate courts. Another such case may not arise for another dozen years. It is doubly important, therefore, that this Court now review the issues, and authoritatively determine, for the future guidance of District Courts, whether the effectiveness of Section 7 has not been improperly limited by the court below. Certainly the trend of judicial construction of the section has been abruptly reversed, for on both points stated above, there are District Court decisions squarely opposed to the result now reached. For this reason, as well as because of the conflict of decisions under Point I, *supra*, the writ now prayed for should be granted.

CONCLUSION

Wherefore, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit be granted.

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